

## **ADVISORY OPINION 2006-005**

**Any advisory opinion rendered by the Registry under subsection (1) or (2) of this section may be relied upon only by the person or committee involved in the specific transaction or activity with respect to which the advisory opinion is required. KRS 121.135(4).**

October 5, 2006

Robert E. List  
331 York Street  
Newport, Kentucky 41071

Dear Mr. List:

We received your written request for an advisory opinion on September 8, 2006. In your request, you provided us the following facts: You are an assistant Campbell County Attorney. In addition to handling misdemeanor cases in Campbell District Court, you have a contract with the Campbell County Fiscal Court to perform civil legal services. Besides the contract being approved by the Fiscal Court, you are not aware of any other connection with your position and the Fiscal Court. You are also under contract to provide legal services for the City of Newport, Kentucky, a city of the second class. You are not an employee of the city but an independent contractor. The City Commission approves your contract and you are under the control of the City Manager and City Attorney. Besides the City Commission approving your contract, you are not under the direct supervision of the commissioners.

Accordingly, you have raised the following questions concerning political contributions to certain candidates:

- (1) Based on the above facts, can you contribute to the election campaign of a person seeking the position of Campbell County Judge Executive or Campbell County Commissioner?

KRS 121.150(6) expressly allows a person to contribute up to \$1,000.00 to any candidate in any one election. “Election” is defined as any primary, runoff primary, regular, or special election, and each of the foregoing is considered a separate election. KRS 121.015(2).

However, KRS 121.045 provides, in relevant part, as follows:

No person ... shall contribute, either directly or indirectly, any money, service, or other thing of value towards the nomination or election of any state, county, city, or district officer who, in his official capacity, is required by law to perform any duties peculiar to the person not common to the general public or to supervise, regulate, or control in any manner the affairs of the person, or to perform any duty in assessing the property of the person for taxation.<sup>1</sup>

In drafting this advisory opinion, the Registry is mindful of an earlier opinion of the Kentucky Attorney General’s Office interpreting this statute upon written request by the Registry. However, the current relevance of OAG 77-40 is questionable based on subsequent case law at both the state and federal level.

Following the issuance of OAG 77-40, in Lee v. Commonwealth, 565 S.W.2d 634 (Ky. 1978), the Kentucky Court of Appeals, the then-highest court, declared that KRS 121.045 was unconstitutional to the extent that contributions to the election campaigns of candidates seeking the office of property valuation administrator by persons whose property the candidates may assess were prohibited. Id. at 638. The court stated that “[t]he obvious purpose intended by KRS 121.045 was to prohibit bribes, coerced donations from employees, and the payment for votes.” Id. at 636 (citations omitted). See also KREF Advisory Opinion 1993-003. However, the court could not “discern a compelling state interest or a legislative intent to deny citizens of a particular county such a basic right as supporting the candidate of their choice for an elected county office.” Id. at 637.

In reaching its decision, the court relied upon one of the leading cases in campaign finance law, Buckley v. Valeo, 424 U.S. 1, 96 S.Ct. 612 (1976). This case reinforces the argument that a legislature is limited in its ability to restrict contributions made in an individual capacity. The U.S. Supreme Court recognized the fundamental

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<sup>1</sup> KRS 121.045 also provides that “[n]o attorney or other person shall accept employment and compensation from any person with the understanding or agreement, either direct or implied, that he will contribute to any candidate or slate of candidates for any office, or on his behalf, any part or all of his compensation, towards the nomination or election of any candidate or slate of candidates.” You state in your written request that your questions are based upon voluntary contributions and are not made under the promise of employment or the threat of termination of employment if not made. Therefore, based on these facts, this statutory provision should not apply to your situation.

First Amendment interests implicated by a political contribution: the freedom of association and the freedom of expression. Id. at 20-22. Further, the Court acknowledged the significance of placing limitations on such a political communication due to “the symbolic expression of support evidenced by a contribution.” Id. at 21. The Court explained that:

[m]aking a contribution, like joining a political party, serves to affiliate a person with a candidate. In addition, it enables like-minded persons to pool their resources in furtherance of common political goals.

Id. at 22. For this reason, a court will apply “heightened scrutiny to such a limitation, asking whether it is justified by a ‘sufficiently important interest’ and ‘closely drawn’ to avoid unnecessary abridgment of the First Amendment.” McConnell v. FEC, 540 U.S. 93, 108, 124 S.Ct. 619, 639 (2003).

Furthermore, the Registry has recently interpreted KRS 121.045 and applied the Lee decision to similar circumstances. In Smith v. Yassney, KREF Case No. 2003-78, a complaint alleged that a mayoral candidate accepted contributions from persons over whom she had supervisory or regulatory control in violation of KRS 121.045. The Staff Report, which was unanimously approved by the Registry Board, recommended that, although Respondent Yassney was not a candidate for PVA, the same reasoning set forth in Lee should be applied to other candidates. Therefore, the case was dismissed pursuant to the prior authority of Lee which ruled against the earlier interpretation advanced by the Registry strictly construing KRS 121.045.

Therefore, subject to the contribution limits under KRS 121.150(6), you may voluntarily contribute to the election campaign of a person seeking the position of Campbell County Judge Executive or Campbell County Commissioner regardless of your contract with the Campbell County Fiscal Court.

- (2) Based on the above facts, can you contribute to the election campaign of a person seeking the office of City of Newport Commissioner?

Based on the analysis set forth above under Question (1), you may also voluntarily contribute to the election campaign of a person seeking the office of City of Newport Commissioner regardless of your contract with the City of Newport, Kentucky, but subject to the contribution limits under KRS 121.150(6).

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Please keep in mind that this advisory opinion is based on the specific facts set forth in your written request. If you have any questions concerning this advisory opinion, please do not hesitate to contact the Registry. Thank you.

Very truly yours,

Connie L. Verrill  
General Counsel